STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,458

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare reducing her ANFC benefits because her oldest child is eighteen years old, but is not expected to graduate high school by the time he is nineteen. The legal issue in the matter is similar to Fair Hearing Nos. 11,260 and 11,648, decided by the Board on May 17, 1993, and presently on appeal before the Vermont Supreme Court (Dkt. No. 93-342). See also Fair Hearing No. 12,274.

FINDINGS OF FACT

The petitioner lives with her husband and their three children. The petitioner's husband is disabled. The family's income consists of ANFC and the husband's Social Security disability benefits. The petitioner's oldest child turned eighteen on November 1, 1993. He is a junior in high school and cannot graduate before he turns nineteen. Because of this, the Department reduced the petitioner's ANFC as of November 30, 1993, by removing this child from the family's grant.

In lieu of an oral hearing in the matter the petitioner introduced uncontroverted documentary evidence in the form of school records and special education evaluations showing that her son repeated grades one and four because of developmental handicaps and a severe hearing impairment. Later, he was advanced from grade five to grade seven, which made up one of the two years he stayed back.

The records show that the petitioner's son was diagnosed as being in need of special education services even prior to entering kindergarten. He showed significant delays in gross motor development and speech and language skills. A psychological evaluation done early in his first grade year concluded "there is little doubt that (he) will have difficulty competing academically with age peers. He will require some type of intervention/support services within the school setting..." Later that school year the decision was made to have him repeat first grade.

The records show that throughout his elementary school years the petitioner's son received special education services and accommodations for his speech and language deficits and his hearing impairment. He was diagnosed as being totally deaf in one ear and having only 40% hearing in the

other. Testing done when he was in the fourth grade showed that he was at least a full year behind (grade equivalent) in reading, mathematics, written language, and knowledge. In the midst of his fifth grade year he was placed back into the fourth grade because he was having difficulty keeping up.

At the end of his full fifth grade year, he was advanced to a special education placement in the seventh grade. Since that time he has been promoted to the next grade each year, but he remains one year behind the class he first entered school with. The petitioner alleges that her son is currently succeeding in a primarily vocational program and that he expects to graduate in 1995, when he will be nineteen.

The school records document that the petitioner's son has been severely hindered in his progress in school because of his diagnosed learning impairment and his hearing loss. The evidence clearly establishes that were it not for his disabilities he would be expected to graduate from high school before reaching age nineteen.

ORDER

The Department's decision is reversed. The petitioner shall be granted ANFC benefits until her son reaches age nineteen.

REASONS

The underlying basis of the Department's decision in this case is a federal AFDC statutory provision, 42 U.S.C. § 606(a)(2), passed by Congress as part of the Omnibus Budget Reconciliation Act of 1981 (OBRA), that defines a "dependent child" as one who is either:

(A) under the age of eighteen, or (B) at the option of the state, under the age of nineteen and a full-time student in a secondary school...if, before he attains age nineteen, he may reasonably be expected to complete the program of such secondary school...

Since 1981, federal and state regulatory provisions have essentially mirrored this language. See 45 C.F.R. § 233.39(b) and W.A.M. § 2301 (in its regulations Vermont adopted the above eighteen-year-old "option").

In the instant case there is no question that the Department's action is in accord with the above provisions. The petitioner's son is eighteen, and he will not graduate from high school before he turns nineteen. The petitioner argues, however, that the federal statute and the federal and state regulations (supra) conflict with the anti-discrimination provisions of the Americans with Disabilities Act of 1990 (ADA).

The ADA at 42 U.S.C. § 12132 provides that:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

In this case there is no dispute that the Department is a "public entity" within the meaning of the Act. See 42 U.S.C. § 12131(1). There is also no dispute that the Department, as a recipient of federal

funding, is also subject to the similar anti-discrimination provisions of section 504. See 29 U.S.C. § 794.

The only factual issue in this case is whether the petitioner's son meets the ADA definition of "disability". In this regard 29 U.S.C. § 706(8)(B) includes the following provision:

Subject to subparagraphs (C),(D), and (F), the term "individual with a disability" means, for purposes of sections 701, 713, and 714 of this title, and titles IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

Based on the above findings it must be concluded that the petitioner's son meets the above definition, and that it is because of his "disability" that he will not graduate high school before he is nineteen.

The petitioner maintains that the graduation requirements of the federal and state statutes and regulations regarding ANFC eligibility for secondary school students age eighteen and over violate the above anti-discrimination provisions of the ADA and section 504. Section 12131(2) of the ADA provides:

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by the public entity.

The crucial question in this case is whether the petitioner's son, were it not for his disabilities,

"meets the essential eligibility requirements" of the pertinent ANFC regulations. If so, 28 C.F.R. § 35.130(b)(7) provides:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

Incredibly, it appears that no federal or state court has yet considered whether the age and graduation restrictions in the AFDC statutes and regulations violate either the ADA or section 504. However, in promulgating federal regulations to implement the ADA the U.S. Attorney General commented that the following practices were prohibited:

...blatantly exclusionary policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate.

56 F.R. 35694, 35704 (1991). Those comments make specific reference to Alexander v. Choate, 469 U.S. 287 (1985), a United States Supreme Court case decided prior to the enactment of the ADA that considered whether certain time limitations on inpatient hospital coverage under medicaid discriminated against the handicapped in violation of section 504. The comments specify that the anti-discrimination provisions of the ADA are consistent with those in section 504 as interpreted in Choate. Id.

In Choate, the Supreme Court adopted a "meaningful access" test to determine that a "facially neutral" provision in the Tennessee medicaid regulations that limited inpatient hospital coverage to fourteen days did not discriminate against handicapped individuals. Id. at 301. In that case the basis of the plaintiffs' argument was that as a general matter handicapped individuals required longer hospital stays. However, in rejecting this argument the Court concluded that "...nothing in the record suggests that the handicapped...will be unable to benefit meaningfully from the coverage they will receive under the 14-day rule." Id. at 302. However, the Court also made clear that there may well be circumstances in which "...reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access." Id. at 301, footnote 21.

While the general eighteen-year-old age limitation in the ANFC program is closely analogous to the fourteen-day medicaid coverage limitation in Choate, the nineteen-year-old graduation requirement is clearly distinguishable. As found above, it is because of the disability of the petitioner's son that he cannot accomplish high school graduation before age nineteen. Thus, it must be concluded that the petitioner's son is indeed being denied an "effective opportunity to participate" in this aspect of the ANFC program to the same extent as non-handicapped recipients.

Moreover, as an eighteen-year-old high school student the petitioner's son "meets the essential eligibility requirements" of the ANFC program in every other respect. Allowing the extension of ANFC benefits to those eighteen-year-old handicapped children who can demonstrate that were it not for their disabilities they would have been able to graduate high school before age nineteen would not constitute a "fundamental alteration" of the ANFC program. Such children would receive no more ANFC than certain other non-handicapped-eighteen-year-old students.

The Department concedes that the purpose of the ADA and section 504 is to "assure that handicapped individuals receive evenhanded treatment". Choate, id. at 304. It is, therefore, concluded, that because the petitioner's son is a high school student who, except for his disability, would meet the graduation requirements of 42 U.S.C. § 606(a)(2) and W.A.M. § 2301, under the ADA and section 504 the Department must grant the petitioner ANFC benefits in her son's behalf until her son reaches age nineteen.

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